No. 16504

United States
COURT OF APPEALS
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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United States
COURT OF APPEALS
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FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

On July 6, 1957, Wanda B. Branch and Merle K. Branch, co-partners d/b/a Riddle General Store, filed in the United States District Court for the District of Oregon, in bankruptcy, a petition praying for adjudication as bankrupts. Thereafter on July 11, 1957, said co-partnership and its members were duly adjudged bankrupts, and their estates are being administered by

said Court in Case No. B-40999. Thereafter Frank A. Dudley was elected Trustee of the estate of said bankrupt partnership and duly qualified by filing bond, and ever since has been the duly elected qualified and acting Trustee of said estate.

Said Trustee filed in the United States District Court for the District of Oregon, in bankruptcy, a suit as Trustee for the said bankrupt, to recover from defendants an alleged preference under Section 60(b) of the Bankruptcy Act. 11 U.S.C.A. Sec. 96.

This suit arises under said Section 60(b) of the Bankruptcy Act and is brought in the United States District Court for the District of Oregon, sitting as a Court of Bankruptcy, as provided by Section 2(a), 11 U.S.C.A. Sec. 11, of said Act granting jurisdiction of such preference suit (Tr. 3). Said United States District Court in said suit entered judgment for the defendants therein, and appellant Trustee prosecutes this appeal from said adverse judgment.

Jurisdiction of this Court is based upon Title 11 U.S.C.A. Sec. 47.

STATEMENT OF THE CASE

On July 1, 1957, and for approximately two years immediately prior thereto, Wanda B. Branch and Merle K. Branch were co-partners doing business as Riddle General Store and operated a general store at Riddle, Oregon, having purchased said business, including fixtures and equipment and a stock of merchandise pursuant to a conditional sales contract (Ex. 2). Said condi-

tional sales contract was not acknowledged so as to entitled it to be recorded, but nevertheless was recorded on June 21, 1957, in the Chattel Mortgage Records of Douglas County, Oregon, which recording was of no legal effect as conceded by the defendants (Tr. 5).

The bankrupts operated said business from April 11, 1955, until on or about July 1, 1957, and during said period of time sold merchandise purchased by them from defendants and replenished same by other merchandise purchased from others on open account (Tr. 54).

On June 21, 1957, and for several months prior thereto, the bankrupts were in default in the making of payments required by said conditional sales contract. By reason of said default, on or about June 21, 1957, appellees commenced in the Circuit Court of the State of Oregon for the County of Douglas a suit against said bankrupts to recover from bankrupts the furniture, fixtures, and the stock of merchandise then in the bankrupts' possession, and in the complaint in said suit prayed for a decree finding them to be the absolute owners of said furniture, fixtures, and stock of merchandise (Ex. 3). In said suit, the bankrupts, on July 1, 1957, stipulated in writing that defendants were the owners of said furniture, fixtures, and stock of merchandise and were entitled to immediate possession of same (Ex. 4), and based thereon a decree was entered on July 1, 1957, in said State Court proceeding, declaring in terms that defendants were the sole owners of said assets (Ex. 5).

On or about said July 1, 1957, said defendants took possession of said assets, including the inventory of merchandise then on hand, which inventory was in the amount of $14,786.17 (Tr. 6), and thereafter retained possession of same notwithstanding the demand of the Trustee on October 4, 1957, that defendants return to him said merchandise for administration in said bankruptcy proceedings (Tr. 6).

At all times between June 21, 1957, and July 1, 1957, inclusive, said bankrupts, individually and as co-partners, were insolvent in that the fair market value of their assets was less than the amount of their liabilities (Tr. 6-7), and that the Trustee has on hand the sum of $1,374.44, has no further assets to be liquidated, and that provable claims have been filed in the bankruptcy proceedings as follows:

a. Priority claims	$ 3,273.32	
b. General claims	11,534.48	(Tr. 7)

The District Court held that the State Circuit Court found that the appellees were the owners of, and held legal title to said merchandise, as distinguished from being mortgagees or lien holders, and that said finding was res judicata and binding upon the Trustee in this preference proceeding, and that since on the date of receipt by appellees of said merchandise from the bankrupts, appellees were the owners thereof, they were in the position of a conditional seller recovering the conditionally sold property and, therefore, no preference could result (Tr. 15-18).

Thus the principal question involved in this appeal

is whether the stipulated decree in the State Court proceeding is res judicata in this suit as to whether or not immediately prior to said State Court proceeding appellees were the holders of an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise as distinguished from legal title owners thereof.

If this Court determines that the matter is not res judicata, then the Court must determine the supplementary question as to whether appellees can claim ownership to approximately one-half of the merchandise by reliance upon the testimony of one of the bankrupts that approximately that amount was still on hand on July 1, 1957 or whether appellees, having allowed their merchandise to become confused with the after-acquired merchandise must specifically point out and identify their own merchandise from the mass.

SPECIFICATION OF ERRORS

The Court erred in the following particulars:

1. The Court erred in failing to find that immediately prior to said State Court proceeding appellees held an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise which equitable lien was perfected as against third parties, including appellant Trustee, upon appellees' acquisition of possession of said merchandise on July 1, 1957 through the medium of said decree and, therefore, constituted a transfer within the meaning of Section 60 of the Bankruptcy Act on said date.

2. The Court erred in finding as a matter of fact and concluding as a matter of law that the decree of the Circuit Court for Douglas County, Oregon, dated July 1, 1957, was res judicata and conclusive of the rights of the Trustee in this preference suit and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act and that, therefore, appellees did not obtain a preference when they received the after-acquired merchandise.

3. The Court erred in failing to find that on July 1, 1957 said bankrupts, individually and as copartners, were insolvent, and that appellees had reasonable cause to believe they were so insolvent and that the transfer was a transfer of bankrupts' property in payment of an antecedent debt, namely, the upaid purchase price under the contract dated April 11, 1955 and that said transfer resulted in appellees' receipt of a greater portion of their debt than other creditors of the same class.

4. The Court erred in failing to find that the transfer of said merchandise on July 1, 1957 resulted in preference voidable under Section 60 of the Bankruptcy Act.

5. The Court erred in failing to legally conclude that appellant was entitled to judgment against appellees, and each of them, in the sum of $14,986.17 with interest at six per cent per annum from October 4, 1957 until paid.

SPECIFICATION OF ERROR NO. 1

The Court erred in failing to find that immediately prior to said State Court proceeding appellees held an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise which equitable lien was perfected as against third parties, including appellant Trustee, upon appellees' acquisition of possession of said merchandise on July 1, 1957 through the medium of said decree and, therefore, constituted a transfer within the meaning of Section 60 of the Bankruptcy Act on said date.

ARGUMENT POINT 1

The conditional sales contract between the Dickies and the Branches was, as to third parties and as to after-acquired merchandise, in legal effect, an unrecorded chattel mortgage.

Davis v. Wood, 200 Or. 602, 623, 268 P.2d 71, 380 (1954).
Kliks v. Courtemanche, 150 Or. 332, 346, 43 P.2d 913, 918 (1935).
In re Chappell, 77 F. Supp. 573 (1948).
Caldwell Finance Co. v. McAllister, 226 F.2d 189 (9th Cir. 1955).
Hughbanks v. Gourley, 12 Wash. 2d 44, 120 P.2d 523, 525 (1941).

The contract provided for the sale of the business, including the stock of merchandise and contained the following provisions:

> "Purchasers agree that they will at all times keep up the inventory of said business to the full sum of $22,000.00 and will at all times keep said stock of

merchandise insured against loss by fire, damage by smoke or water, in the sum of $22,000.00 and said fixtures in the sum of $2,000.00. All policies of insurance to be so written as to set forth the interest of the Sellers and the Purchasers.

"Notwithstanding the fact that the Purchasers shall have the right to sell merchandise from the stock on hand and continue to operate said business in a regular and general manner, the title to said fixtures and inventory shall in the event of default, as well as at all times herein mentioned, shall remain in the Sellers until the full balance of purchase price and interest as herein provided has been fully paid.

"Purchasers agree that they will pay for all merchandise delivered to said business as the same is received to the end that all such merchandise shall become a part and parcel of the stock and inventory and the title immediately vested in the Sellers, subject only to right of the Purchasers as in this contract provided."

Said contract also provides as follows:

"If purchasers default in any of the payments when due, or breach any of the provisions of this contract, or the lease herein referred to, or if said within property is attached or levied upon under any writ or process of any court, or if Purchasers are declared bankrupts, or upon any unusual or unreasonable depreciation in the value of the property, or if the Sellers feel insecure, of which the Sellers shall be the sole judges, Sellers may, at their option, without previous demand or notice, exercise any one of the following three options.

1. Retake possession of said within property, with or without process of law; and all payments theretofore made hereunder shall thereupon be forfeited to Sellers and this contract shall therefore terminate and all rights of Purchasers in this contract and said within described property shall thereupon cease and are hereby waived; or

2. Sellers may declare the whole of the sums then remaining unpaid to be immediately due and payable and sue therefor, or
3. Sellers may retake possession of the said herein described property, with or without process of law and cause said within described property to be sold either at public auction or private sale or Sellers may foreclose this contract in strict foreclosure in the manner provided by law.

"In the event suit be instituted to foreclose this contract, Sellers shall have the right to apply to the court in which said proceeding is commenced for the appointment of a receiver to take possession of the business and the personal property and the leased premises and to carry on the business, said receiver to make an accounting to the court on the conduct of said business. In the event suit be instituted to foreclose as aforesaid and a receiver is appointed, Purchasers agree to pay such additional sum as the court shall fix as reasonable attorney's fees in said foreclosure proceedings, as well as a reasonable receiver's fee and reasonable attorney's fees for the attorney who may represent the receiver in any such proceeding.

"Notwithstanding anything to the contrary herein contained or any of the other obligations or rights of the parties hereto, Purchasers agree that they will, at least once each year, furnish to Sellers the complete inventory of the stock and merchandise then on hand. In the event said inventory shows that Purchasers are not maintaining the full amount of merchandise and stock as in this contract provided, then the Purchasers will forthwith increase the stock of merchandise to comply with the terms of this contract."

There is some serious question in the mind of the writer as to whether a fair interpretation of the default provisions refers to more than the original merchandise

and inventory because it constantly uses the expression "retake possession" when it is obvious that prior to default the sellers would never have possession of the after-acquired merchandise. However, assuming that the contract provisions are broad enough to include the after-acquired merchandise, then appellant contends that all that the appellees had with regard to said after-acquired merchandise was a lien in the nature of a chattel mortgage.

By definition, a "conditional sales contract" is a document designed to retain title in the seller of property sold by him, and it is not the office of the conditional sales contract to provide security upon property never owned or sold by the party to whom the conditional sales contract is given.

The above conforms to logic but is also supported by abundant legal authorities. In Davis v. Wood, 200 Or. 602, 268 P.2d 371 (1954) the facts were as follows:

> Seller sold upon conditional sales contract certain restaurant equipment and fixtures, and under and pursuant to the contract, purchasers were required to purchase and install additional fixtures of approximately $2,500.00; and the contract provided that: such additional personal property and fixtures shall be deemed and considered as part of the sellers' property which they are hereby selling under the contract to the buyer, and all of the terms and conditions heretofore mentioned in this contract shall apply to all of such additional property installed by the buyer and all other additions which he may make or install during the term of this contract.

Plaintiff brought a suit for declaratory judgment

and requested the Court to declare a forfeiture of the conditional sales contract and to quiet title in plaintiff to all of the property, including the additionally-acquired property.

In connection with the additionally-installed property, the Court stated on pages 623, 380:

> ". . . We agree that the additional property purchased and installed by the plaintiff became security for any sum which may be found to be due to the defendants, but we hold that it did not become the property of the vendors when it was first purchased and installed. The following cases indicate that an agreement, in form a conditional sales contract, should be treated in equity as a chattel mortgage when the purpose of the transaction is to give to the person named as the conditional seller, security in property which he never owned and therefore could not have sold. Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 P. 340, 215 P. 171; Kliks v. Courtemanche, 150 Or. 332, 43 P2d 913. In Borengasser v. Chatwell, 207 Ark. 608, 182 SW2d 389, the vendor sold the assets of a business, retaining title until the full purchase price should be paid. The contract provided:
>
> > '. . . that the seller should have title not only to the "present assets" of the business "but is to be given title to any new merchandise purchased for said company until the entire purchase price referred to herein has been paid." Another clause provides that the buyer should keep the stock and assets up and in good condition, take care of the accounts both payable and receivable and pay taxes. On failure to comply with any provision of the contract, purchaser agreed to deliver possession of said assets on demand to seller.'
>
> "On default of the buyer the assignee of the seller brought action to establish and enforce a vendor's

lien on all of the assets, including the after-acquired property. The Supreme Court held that the sellers were not entitled to a declaration of a vendor's lien under Section 11422 of Pope's Digest and that the statute contemplated that one must be the vendor of the chattels if he is to have the benefit of a vendor's lien. The court then said:

> 'But as to the chattel assets acquired by Borengasser after the original sales contract, Chatwell was not the vendor, was never the owner, and it is difficult to perceive how he or his assignee could establish a vendor's lien on property he did not own and did not sell. As to this, we think the court erred in declaring and attempting to enforce such a lien. Not having the right to such a lien, appellee had no right to an attachment of this property and the court erred in sustaining it to this extent only, because the title to the so-called "new property" was never in appellee. Ferguson v. Hetherington, 39 Ark. 438.
>
> 'We think the contract here involved was ineffectual insofar as it attempted to put the title to the "new property" in appellee so as to give her a vendor's lien under said statute, but we agree with appellants that it did give her an equitable lien on said assets acquired subsequent to the date of said contract which lien might have been enforced in a court of equity . . .' "

The principle applied in that case is applicable here.

In the case of Kliks v. Courtemanche, 150 Or. 332, 43 P.2d 913 (1935), the seller therein attempted to use a document, in form a conditional sales contract, to secure him for a previously incurred open account. The Court in that case, on pages 346, 918, stated as follows:

> "We are unwilling to extend our conception of what may constitute a conditional sale contract to include the transaction between Phelps and the defendant

> culminating in the execution of the instrument of December 5, 1931. Conditional sale contracts are affected with secretiveness by nature, and their function can be much abused. They should not be employed to displace chattel mortgages which to afford protection to the mortgage must be recorded."

The United States District Court for the District of Oregon in In re Chappell, 77 F. Supp. 573 (1948) similarly held in connection with trust receipt transactions.

This Court in Caldwell Finance Co. v. McAllister, 226 F.2d 189 (1955) approved of Kliks v. Courtemanche (Supra).

The Washington Supreme Court in Hughbanks v. Gourley, 12 Wash. 2d 44, 120 P.2d 523, 525, stated the matter as follows:

> "This court has held that it is not the office of a conditional bill of sale to secure a loan of money. Its purpose, rather, is only to permit an owner of personal property to make a bona fide sale on credit, reserving title in himself, for security, until the purchase price is fully paid. Lyon v. Nourse, 104 Wash. 309, 176 P. 359. This particular security device, with its severe remedial incidents, is not favored in the law and its use has been restricted to situations where persons standing in the actual relation of vendor and vendee have desired to effect a credit sale. It is in such cases that it finds its only legitimate use.
>
> "Where on the other hand, one who is the owner of a particular chattel wishes to borrow money and is willing to let the chattel stand as security for his debt, a chattel mortgage is the appropriate means for affording such protection to the creditor. And this is as true where the property mortgaged is purchased with the borrowed funds as where it has long been in the borrower's possession."

Thus, under the existing state of both Oregon and Federal law, the only position which defendants can successfully assert, is that on July 1, 1957, and immediately prior to the transfer of the merchandise to them, they were as to said after-acquired merchandise in the position of chattel mortgagees by virtue of an unrecorded instrument in the nature of a chattel mortgage.

ARGUMENT POINT 2

Said unrecorded chattel mortgage was not valid as against attaching creditors (and a trustee in bankruptcy) until the rights of the Dickies were perfected by their taking of possession on or about July 1, 1957.

Bankruptcy Act, Section 60, 11 U.S.C.A. Section 96.
Oregon Revised Statutes, Section 86.420.
Oregon Revised Statutes, Section 29.150.
Bankruptcy Act, Section 70c, 11 U.S.C.A. 110.
In re Chappell, 77 F. Supp. 573 (1948).
First National Bank of Burns v. Frazier, 143 Or. 662, 688, 19 P.2d 1091, 22 P.2d 325, 333 (1933).

As conceded by appellees, said conditional sales contract although physically placed in the chattel mortgage records on June 21, 1957, lacked an acknowledgement, so that its recording was of no legal effect; and, therefore, on the date of acquisition of possession by appellees, said instrument should be considered as unrecorded for the purposes of this case.

Section 60 of the Bankruptcy Act, 11 U.S.C.A. Section 96, provides in part as follows:

"(2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real

property shall be deemed to be made by or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."

Oregon Revised Statutes, Section 86.420 provides as follows:

"WHEN MORTGAGE VOID AS AGAINST SUBSEQUENT PURCHASERS OR ENCUMBRANCES; DURATION OF LIEN; AFFIDAVIT OF RENEWAL: (1) Every mortgage, deed of trust, conveyance or instrument intended as a mortgage of personal property either alone or with real property, which is not accompanied by immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which is not recorded or filed as provided in O.R.S. 86.350 and 86.370, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property or any portion thereof."

Oregon Revised Statutes 29.150 provides as follows:

"PLAINTIFF DEEMED PURCHASER IN GOOD FAITH: From the date of the attachment, until it is discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, subject to the conditions prescribed in O.R.S. 29.190 as to real property."

Section 70c of the Bankruptcy Act, 11 U.S.C.A. Sec. 110 provides in part as follows:

"The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of

> such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Therefore, since the Trustee is, by virtue of Section 70c, in the position of an attaching creditor, and by virtue of Oregon law an attaching creditor is in the position of a purchaser in good faith and for a valuable consideration, then in Oregon a Trustee is in the position of a purchaser in good faith and for a valuable consideration, and the District Court in Oregon has so held (see In re Chappell, supra).

From the above quoted statutes, it follows that as against the Trustee an unrecorded chattel mortgage is void.

However, numerous Oregon cases have held that the taking of possession by the mortgagee has the effect of perfecting the mortgage and is a substitute for recording.

In First National Bank of Burns v. Frazier, 143 Or. 662, 688, 19 P.2d 1091, 22 P.2d 325 (1933), the matter is stated as follows on page 688, 333:

> "10. In the case of Kenney v. Hurlburt, 88 Or. 688 (172 P. 490, 173 P. 158, Ann. Cas. 1918E, 737, L.R.A. 1918E, 652), it is stated that where the mortgage was upon a fluctuating stock of goods the lien became perfected when the mortgagee was put in possession of the merchandise, and that the mortgage operated as an executory agreement, which subjected the after-acquired goods to the lien of the mortgage upon the mortgagee's taking possession of the same.
>
> "It is contended, however, by the appellant here,

> that this statement by the court was not material to the decision in the case and therefore is not controlling here. This court has re-examined the many authorities cited in the opinion in support of the foregoing statement and is satisfied that the proposition of law therein stated is sound. See in this connection, First National Bank v. Wegener, 94 Or. 318 (186 P. 41), Wiggins Co., Inc. v. McMinnville Motor Car Co., 111 Or. 123 (225 P. 314), and Ruth v. Cox, 134 Or. 200 (291 P. 371)."

In the instant case, appellees received actual possession on July 1, 1957, and received constructive possession by virtue of the stipulation and the decree, and so on that date appellees perfected their mortgage as against the Trustee.

This then is the date referred to in Section 60a (2) and, therefore, is the date of transfer within the meaning of the preference sections of the Bankruptcy Act, and, therefore, unless the State Court proceeding has the effect which was attributed to it by the District Judge, then a perference resulted on July 1, 1957 as all other elements of the preference were conceded by appellees.

SPECIFICATION OF ERROR NO. 2

The Court erred in finding as a matter of fact and concluding as a matter of law that the decree of the Circuit Court for Douglas County, Oregon, dated July 1, 1957, was res judicata and conclusive of the rights of the Trustee in this preference suit and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section

67 of the Bankruptcy Act and that, therefore, appellees did not obtain a preference when they received the after-acquired merchandise.

ARGUMENT POINT 3

The legal effect of the State Court decree was to effect a foreclosure of an unrecorded chattel mortgage.

Davis v. Wood, 200 Or. 602, 268 P.2d 371 (1954).

As we have noted hereinabove under Point 1, it is the law in Oregon, as well as general law, that a conditional sales contract as to third parties and as to after-acquired merchandise, is in legal effect an unrecorded chattel mortgage.

Therefore, at the commencement of the State Court proceeding, we find the parties in the position of mortgagor and mortgagee.

It may be noted that the decree in the State Court proceeding was based upon a stipulation of the parties and not upon an actual trial and so, in fact, no findings were made by the Trial Court, but the complaint (Tr. 3) is labeled "Complaint in Equity" and contains the allegations of a foreclosure complaint, and said State Court did not have to determine more than that, as between the parties, the appellees were entitled to said merchandise as security as stated in Davis v. Wood, Supra.

ARGUMENT POINT 4

Said State Court decree is not res judicata of the rights of the Trustee in this preference suit.

Lawlor v. National Screen Service Corporation, 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122, 1126 (1955).
30A Am. Jur. JUDGMENTS, Section 399, page 451 (Ed. 1958).
Bankruptcy Act, Sections 60, 67 and 70, 11 U.S.C.A. 96, 107, 110.
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Jacobs v. Jacobs, 92 Or. 255, 260, 180 P. 515, 516 (1919).
Saper v. Long, 121 F. Supp. 65 (D.C.N.Y. 1954).
United States of America v. International Building Company, 345 U.S. 502, 73 S. Ct. 807, 97 L. Ed. 1182 (1953).
Annotation, 2 ALR 2d 514, 551 (1948).
Clark v. Mutual Lumber Co., 206 F.2d 643 (5th Cir. 1953).
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In re Mercury Engineering Company, Inc., 68 F. Supp. 376 (D.C. Cal 1946).
Eyster v. Gaff, 91 U.S. 521, 23 L. Ed. 403 (1876).
Linstroth Wagon Co. v. Ballew, 149 F. 960 (5th Cir. 1907).
In re Winter, 17 F.2d 153 (D.C. Mich. 1927).
Heiser v. Woodruff, 327 U.S. 726, 90 L. Ed. 971 (1946).
Zamore v. Goldblatt, 194 F.2d 933 (1952).
Berara v. City Real Estate Company, 64 F.2d 498 (2d Cir. 1933).

Sanford v. Boland, 287 N.Y. 431, 40 N.E. 2d 239, 241 (Ct. App. N.Y. 1942).

The doctrine of res judicata has been much defined, but was defined by the United States Supreme Court in Lawlor v. National Screen Service Corporation, 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122, 1126 (1955), as follows:

> "Thus under the doctrine of res judicata a judgment, 'on the merits' in a prior suit involving the same parties, or their privies, bars a second suit based on the same cause of action."

Thus in order to successfully bar the Trustee in the instant proceeding, by virtue of the doctrine of res judicata, appellees must show that the Trustee is the same party as the bankrupts, or in privity with them, and that the cause of action in the instant case is the same cause of action as was involved in the State Court proceeding.

Obviously the Trustee in bankruptcy, a person who came into being after termination of the State Court proceeding, in the capacity of representative of the creditors, cannot be the same party; so appellees must rely upon the contention that the Trustee is in privity with the bankrupt. The author in Volume 30A Am. Jur., JUDGMENTS, Section 399, page 451, states as follows:

> "Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relationship to the subject matter of the litigation, and that the rule

> is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right or property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment, through or under one of the parties, as by inheritance, succession, purchase or assignment."

To put it succinctly, a privy is one who stands in the shoes of his predecessor.

It is believed by the writer that much of the confusion which surrounds the doctrine of res judicata, as applied to a Trustee in bankruptcy, arises out of a failure to distinguish between the Trustee in his capacity under Section 70a of the Bankruptcy Act, as an assignee of the rights of the bankrupt and successor to the interests of the bankrupt in and to the property of the bankrupt, and the Trustee's other capacity under the avoidance sections of the Bankruptcy Act, namely Sections 60 (preferences), 67 (judicial liens), and 70c (strong arm clause), which give to the Trustee rights and title not possessed by the bankrupt.

So long as the Trustee appears in his capacity derived under Section 70a of the Bankruptcy Act, the writer believes that the Trustee is in privity with the bankrupt, because under said section he has no higher rights, or other and different rights than did the bankrupt.

However, Congress was not content to leave the Trustee in the capacity of a mere successor to the rights of the bankrupt, and therefore added Sections 60, 67 and

70c, all of which gave the Trustee the capacity of a lien creditor, with an attachment or execution, which, of course, is a vastly different capacity from that of the bankrupt himself, and it appears to the writer that on logic, when the Trustee appears in the capacity of the ideal creditor holding a lien by equitable or legal proceedings, he is not then in privity with the bankrupt.

Professor James W. Moore, Editor in Chief of the 14th Edition of Collier on Bankruptcy, considered the matter in an article entitled Res Judicata and Collateral Estoppel in Bankruptcy, published in Yale Law Journal, Volume 68, number 1, November 1958, and reprinted in the Journal of the National Association of Referees in Bankruptcy in Volume 33, in the issues published in April and July 1959, and in said article states as follows:

> "In summary, then, since under Section 70a of the Bankruptcy Act, the trustee succeeds to the bankrupts property, the trustee is properly in privity of estate with the bankrupt as to that property at the time of bankruptcy. Generally, also, the trustee is so far in privity with the bankrupt that in personam judgments rendered prior to bankruptcy against the bankrupt and in favor of creditors are binding upon the trustee. In considering these general propositions, however, one must remember that the Bankruptcy Act empowers the trustee, under certain circumstances, to avoid judicial liens and preferential, fraudulent, and other proscribed transfers, for the benefit of the unsecured creditors he represents. And, further, judgments obtained against the bankrupt by fraud or collusion may not be binding upon the creditors' representative, their trustee. Thus, the idea of the trustee's privity with the bankrupt will not be pushed to the point that the estate is bound by judgments that would defeat the proper and just objectives of the Bankruptcy

> Act. Subject to these qualifications, the general principles of privity are applicable in bankruptcy."

Professor Moore also states as follows:

> "This procedure would not violate the doctrine that an issue which has been fairly adjudged is closed to relitigation, since there is incomplete privity between bankrupt and the trustee. The latter not only takes the bankrupt's estate but also represents creditors; thus, a judgment, though binding upon the bankrupt, is not always conclusive upon the creditors or their trustee."

The Ninth Circuit in Meier & Frank Co. v. Sabin, 214 Fed. 231 at page 233 recognized that the Trustee occupied a status entirely different from that of the bankrupt when it stated as follows:

> "It is possible that the bankrupt might not be permitted to make this objection if it were shown that the bankrupt had received the goods and had identified them by taking them into possession. But the Trustee in bankruptcy, standing in the shoes of the bankrupt, with all the rights, remedies and powers of a lien creditor with respect to all property in the custody of the bankrupt Court occupies a different position."

It appears to the writer that the Trustee proceeding under the avoidance sections of the Bankruptcy Act, is not thus in privity with the bankrupt within the meaning of the doctrine of res judicata.

The second important matter involved is whether or not the cause of action in the instant case is the same as the cause of action in the State Court proceeding.

As previously shown, the action in the State Court

proceeding was between the parties to the contract and was an action simply and solely on behalf of the appellees to recover from the bankrupts the property by reason of default of the bankrupts under said contract. In the instant proceeding the Trustee is not endeavoring to recover said property by reason of the fact that the bankrupt was not in default, or by reason of the fact that the appellees were not entitled to the property as against said bankrupt, but the instant cause of action arises out of Section 60 of the Bankruptcy Act, and the instant cause of action is based upon the fact that appellees in said State Court proceeding were entitled to receive said property. The instant cause of action did not even arise until after the termination of the State Court proceeding, and upon the date of the commencement of the bankruptcy proceeding, and therefore it seems clear that the cause of action is not the same.

The Oregon Supreme Court in Jacobs v. Jacobs, 92 Or. 255, 260, 180 Pac. 515, 516 (1919), stated:

> "If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible."

The only defense available to the bankrupt in the State Court proceeding was that he was not in default, and that he had made the proper payments, or that he

did not owe the money, whereas in the instant proceeding, the Trustee must show that in fact the bankrupt did owe money to the appellees and that appellees were entitled to recover the property under the contract, and Trustee must show the other elements of preference required by Section 60; the proofs in the two actions are entirely different, and the causes of action are not the same.

The Court in Saper v. Long, 121 F. Supp. 65 (D.C. N.Y. 1954), in a case in which the Trustee was suing for recovery of a preference following an earlier State Court proceeding, and in which the defendants defended on the ground of res judicata, held that the actions were different, and said on page 66 "Cause of action under the Bankruptcy Act were not adjudicated. Thus, we deal here not with the doctrine of res judicata, but with an aspect of it—collateral estoppel."

By reason of the fact that the causes of action are different, and that the parties are different, res judicata is not involved in this proceeding, and the Court's decision below can only be sustained, if at all, upon the doctrine of collateral estoppel.

The United States Supreme Court in the United States of America v. International Building Company, 345 U.S. 502, 97 L. Ed. 1182, 73 S. Ct. 807 (1953), differentiates between res judicata and collateral estoppel at 504 as follows:

> "A judgment is an absolute bar to a subsequent action on the same claim.
>
> "But where the second action between the same parties is upon a different claim or demand, the

> judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined in the original action, not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action." (Emphasis supplied)

It should be noted that the doctrine of collateral estoppel applies only in the second action as between the same parties, or their privies, and therefore unless this Court is satisfied that the Trustee in bankruptcy, in his capacity under Section 60 of the Bankruptcy Act, is in privity with the bankrupt, the judgment of the District Court is erroneous.

However, if this Court should conclude that the law is that the Trustee is in privity with the bankrupt even under the avoidance sections of the Act, then it is necessary for appellees to establish that the matter which is the subject of litigation in this proceeding, was previously litigated and determined.

The appellees contended in the District Court proceeding that the appellees "owned" or had legal title to the after-aquired merchandise, and that therefore the Trustee in the instant proceeding is bound by such determination and cannot establish a preference in this proceeding by showing that appellees did not have title to the after-acquired merchandise but rather were lienors

thereof under an instrument in the nature of an unrecorded chattel mortgage, and the District Court adopted this argument as its conclusion.

In the State Court proceeding, however, no trial was held but rather judgment was entered based upon stipulation of the parties (Ex. 4) and decree was entered without findings (Ex. 5).

Therefore, appellees cannot bring themselves within the rule stated by the U. S. Supreme Court in U. S. of A. v. International Building Company, Supra, in that the question of title was not actually litigated or determined.

In fact, it appears to be a general rule that although a consent or stipulated judgment is res judicata in a subsequent action between the same parties upon the same cause of action, nevertheless such a judgment has no effect by way of collateral estoppel in a subsequent action. The United States Supreme Court stated this rule in Lawlor v. National Screen Service Corp., supra.

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not therefore such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

Also see annotation "Consent Judgment as Res Judicata," 2 A.L.R. 2d 514, 551 (1948) where the author stated:

> "Most courts, however, apply to consent judgments the general rule that a former judgment does not operate as estoppel in a subsequent suit upon a different cause of action as to such matters as were not actually or necessarily determined in the former litigation, such as a counterclaim which

> might have been, but, in fact, was not interposed therein. This rule is particularly applicable to judgments entered by consent in favor of the plaintiff because the defendant might have submitted either to avoid litigation or because he thought it not worth his while to try the question."

In the State Court proceeding, even had a trial been held, it would not have been necessary to try the question of title as between the parties but this Court is being asked to speculate further that even in the absence of a trial such a determination was made.

The District Court cited in support of its holding in the Court below, the following cases:

Clark v. Mutual Lumber Co., 206 F.2d 643 (5th Cir. 1953).

Stark v. Baltimore Soda Fountain Mfg. Co., 101 F. Supp. 842 (D.C. Md. 1952).

Covey v. American Distilling Co., 132 F.2d 453 (7th Cir. 1943).

In re Mercury Engineering Company, Inc., 68 F. Supp. 376 (D.C. Cal. 1946).

The Clark case may be distinguished from the instant case in that the decree was not entered in the State Court until twenty days after the adjudication in bankruptcy, whereas in the instant case the decree was entered prior to the adjudication in bankruptcy. The Court made a point of the fact that no attempt had been made by the Trustee to intervene in the State Court proceedings. When met with the argument that probably there was not yet a Trustee in existence at the time, the Court said that this was not to be presumed as the record before the Court did not show when a Trustee became qualified. Furthermore, the Court said

that since the State Court had retained jurisdiction over the foreclosure sale and confirmation of same, presumably intervention would have been entertained by the State Court up to time of entry of confirmation of sale. It is therefore apparent in the Clark case that the Court felt that the Trustee was entitled to his day in Court, and could have it. There is no similar situation in the instant case.

Furthermore, in the Clark case the Court was influenced by the fact that the case brought by the Trustee involved not only recovery of a preference, but determination of the fact whether the bankrupt had an interest in property acquired in the name of third persons. The Court stated at page 647 as follows:

> "It is clear that upon his election as Trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of bankruptcy proceedings, and has no right to have set aside the transfer of property such as that herein involved, which did not, according to the decree of the State Court, belong to the bankrupt."

It is submitted that the Court in the Clark case nevertheless erred in its conclusions upon the facts of that case. It is quite clear that the language above quoted from the Court's opinion states the applicable law under Section 70a of the Bankruptcy Act, where the Trustee seeks to recover in the right of the bankrupt and has nothing to do with the avoidance sections. Had the Trustee been seeking to recover the property under Section 70a, the Court in the Clark case would have been correct, but since the Trustee was in fact

pursuing the property in a preference suit, no res judicata was involved, but rather the doctrine of collateral estoppel and the Trustee was not bound by any finding of title in the State Court proceedings.

The fact that the Court erred in its conclusion is indicated by its reliance upon the case of Eyster v. Gaff, 91 U.S. 521, 23 L. Ed. 403, a case decided by the United States Supreme Court in 1876. The Trustee in the Eyster case relied solely upon the proposition that the adjudication in bankruptcy automatically ousted the State Court of any jurisdiction to proceed in the case, and the Trustee felt that even after the State Court decree, he could impeach that decree by putting forth the same defenses as were put forth in the State Court proceeding by the bankrupt. This, of course, is not so, and the doctrine of res judicata applies, and was no authority against the proposition asserted by the Trustee in the Clark case.

In the other three cases cited by the District Court herein, anything stated by said Courts on the subject matter was pure dictum. In the case of Stark v. Baltimore Soda Fountain Mfg. Co. the holding of the Court was "that the statute of limitations had run against the trustee" and in this the Court was correct. Furthermore, the Court felt that the Trustee should have intervened in the State Court proceeding which was still pending on the date of bankruptcy, and rejected his excuses for failure to do so.

The Court in the Stark case said "the Trustee in this case, having succeeded to the situation of the bankrupt,

is bound by the adverse State judgment, and cited Linstroth Wagon Co. v. Ballew, 149 Fed. 960 (5th Cir. 1907) and In re Winter, 17 F.2d 153 (D.C. Mich 1927). Like the Court in the Clark case, the Court in the Stark case is quoting language applicable to Section 70a, and the Linstroth Wagon case was decided before the avoidance sections, and the Court in In re Winter specifically stated in that case that the Trustee did not claim that the judgment was fraudulent or preferential, and indicated that its opinion would have been otherwise had that been the case.

All of the other citations in the Stark case are applicable to 70a citations and not to preference cases. Even Collier was cited, and the actual opinion of the author of Collier upon this subject matter has been cited hereinabove.

In Covey v. American Distilling Co., Supra, the facts were unusual in that it appeared that there was only one creditor in the bankruptcy proceeding. This creditor had previously brought a proceeding in the nature of a creditor's bill to litigate the precise question which was subsequently attempted to be litigated by the Trustee, namely the validity of a contract. The actual holding of the Court was that the contract was valid, and not that it was res judicata in the second proceeding, however, the Court did so state, but it must be remembered that this was not a preference situation.

In In re Mercury Engineering, Inc., Supra, the holding of the Court was that in fact the mortgage was not invalid under California law, and it was not a proceeding

under the preference sections, and could not have been because more than four months had elapsed. Insofar as the State Court Proceeding determined the amount of the creditor's claim, and this was the principal issue involved, the case is correct. Apparently the Court was bothered by this decision as the footnote sets forth cases attempting to show that creditors could have intervened in the State Court proceeding to protect themselves.

The Court cites and quotes from Heiser v. Woodruff, 327 U.S. 726, 90 L. Ed. 971 (1946). This case does not support the Court's conclusion for in that case, not only had the bankrupt appeared in the State Court proceeding and litigated his matter, but so also had the Trustee, as noted by the United States Supreme Court.

On the other hand there is very respectable authority for the proposition that a State Court decree in a foreclosure suit does not bind the Trustee in a subsequent preference suit brought under the avoidance sections of the Bankruptcy Act.

In Zamore v. Goldblatt, 194 F.2d 933 (1952), the Second Circuit so held. A suit to foreclose a chattel mortgage was commenced on November 3, 1949, and judgment rendered on December 29, 1949, adjudging possession and title in the mortgagor. On February 23, 1950, involuntary petition was filed against the mortgagor, and on June 22, 1950, the Trustee took possession and brought proceedings to sell the property free and clear of liens, and contended that said mortgage

was invalid, whereas the mortgagee defended on the ground that the title to, and possession of the chattels were in him by virtue of the judgment, which judgment was res judicata. The Court stated on page 934, as follows:

> "Moreover, the judgment in favor of Goldblatt in the N. Y. State Court action was not res judicata as against the Trustee. It was based on a mortgage that was properly held bad for lack of prompt filing and could not bind creditors or the Trustee in bankruptcy who stands in their shoes. The delay of twenty-nine days in filing was inadequately explained or excused and rendered the mortgage bad as against creditors."

In the case of Saper v. Long, 121 F. Supp. 65 (D.C. N.Y. 1954), the Court held that a prior mortgage foreclosure suit was not res judicata against the Trustee in a subsequent preference suit.

In Berara v. City Real Estate Company, 64 F.2d 498 (2d Cir. 1933) which was an action brought by the Trustee under Section 70e of the Bankruptcy Act, the Court held that the Trustee was not bound by the prior foreclosure suit in the State Court proceeding, and stated as follows:

> "A judgment in foreclosure in the State Court will not determine the issues in the present suit, for the issues involved here have not been tendered in the State Court action, nor have the Trustees in Bankruptcy been made parties thereto. Their rights, if established, are superior to those of the defendants, and of the Realty Construction Corporation, which is charged with having created a mortgage lien in fraud with creditors."

In Sanford v. Boland, 287 N.Y. 431, 40 N.E. 2d 239 (Ct. App. N.Y. 1942), a case sometimes cited for the proposition that a prior foreclosure suit is res judicata in a subsequent preference suit actually decided that since there was no evidence of a preference, the matter was res judicata, and on page 241 stated:

> "Only as to unlawful preferences and property fradulently conveyed has the Trustee any rights, in the interest of creditors, beyond those which the bankrupt itself could have enforced."

Also, Professor Moore in his said article on res judicata and collateral estoppel, states as follows:

> "Somewhat different principles are involved whenever the post-bankruptcy judgment is in rem. If an in rem suit commenced prior to bankruptcy or reorganization is not stayed, the in rem judgment binds the bankrupt's or debtor's estate whether or not the Trustee has become a party to the action. To this extent, the Trustee is treated as any other person succeeding to an interest in property pending litigation. But the judgment does not preclude the Trustee from suing either the plaintiff of the in rem suit or some other appropriate person to recover property pursuant to the avoidance sections of the Bankruptcy Act dealing with preferential, fraudulent and other voidable transfers. Moreover, under the better view, an in personam deficiency decree rendered after bankruptcy in the in rem suit does not so bind the Trustee unless he became a party to the action."

ARGUMENT POINT 5

Said State Court decree determined only that said Dickies were entitled to possession of said merchandise as against the bankrupts, and made no determination that said Dickies held title to said merchandise as against third party creditors, including the Trustee in Bankruptcy.

Masterson v. Pacific L. S. Co., 144 Or. 396, 404, 24 P.2d 1046, 1049 (1933).
30A Am. Jur., JUDGMENTS, Section 466, page 506 (Ed. 1958).
Saper v. Long, 121 F. Supp. 65, 66 (D.C. N.Y. 1954).

The only parties in said State Court proceeding were the original parties to the instrument.

In fact no answer or other pleading was ever filed in said State Court proceeding by the bankrupts, but had a pleading been filed, the only defenses open to the bankrupts were that defendants were not in default or that defendants did not owe the money.

Until the subsequent adjudication in bankruptcy no cause of suit for unlawful preference existed because said suit arises out of the Bankruptcy Act and flows only to a Trustee in bankruptcy, and there is no such proceeding authorized under the law of the State of Oregon.

It is, therefore, obvious that said State Court in said State Court proceeding could not determine matters with respect to third party creditors or a Trustee in bankruptcy who were not parties to the proceeding.

The Oregon Court in Masterson v. Pacific L. S. Co., 144 Or. 396, 404, 24 P.2d 1046, 1049 (1933), stated as follows:

> "A Decree is not and cannot be considered as operating as an estoppel as to facts which did not occur or rights which did not accrue until after the particular judgment was rendered and which were not involved in the suit in which it was rendered. A decree is not conclusive upon any point or question which from the nature of the case, the form of the action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered; nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court. 34 C.J. 932, et seq. 1338, 1339; Hunter v. Roseburg, 30 Or. 588 (156 P. 267, 157 P. 1065)."

Therefore, it appears that the Court was not asked to determine rights of third party creditors or those of the Trustee in bankruptcy, nor could the Court in the circumstances have done so.

If the appellees desire to rely upon the doctrine of collateral estoppel, the burden is on them to prove that title was determined in the State Court proceeding.

In Am. Jur., Vol. 30A, Section 466, page 506, the author states:

> "The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action, where this does not appear from the record. Under this view, it must clearly appear from the record in the former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of res judicata is invoked as a bar was, in fact, necessarily adjudicated in the former action. It is said that the defense of res judicata

> through estoppel is to be allowed with caution, and it must rest upon a more solid basis than mere speculation as to what was actually adjudicated in the prior action. Proof of identity of issues must be estabilshed by a preponderance of the evidence, and there can be no estoppel where there is a reasonable doubt whether a fact was actually adjudicated."

The Court in Saper v. Long, 121 F. Supp. 65, at page 66 stated that the burden is on him claiming under collateral estoppel to distinctly show that the precise matter was put in issue in the State Court proceeding, and that a decision on that issue was necessary to the resolution of the conflict before the Court, thus the burden is on appellees in this proceeding to prove that title to the merchandise was in issue in the State Court proceeding and that such issue was necessary to the State Court's decision. This the appellees have not done, and cannot do.

SPECIFICATION OF ERROR NO. 3

The Court erred in failing to find that on July 1, 1957 said bankrupts, individually and as copartners, were insolvent, and that appellees had reasonable cause to believe they were so insolvent and that the transfer was a transfer of bankrupts' property in payment of an antecedent debt, namely the unpaid purchase price under the contract dated April 11, 1955 and that said transfer resulted in appellees' receipt of a greater portion of their debt than other creditors in the same class.

SPECIFICATION OF ERROR NO. 4

The Court erred in failing to find that the transfer of said merchandise on July 1, 1957 resulted in a preference voidable under Section 60 of the Bankruptcy Act.

SPECIFICATION OF ERROR NO. 5

The Court erred in failing to legally conclude that appellant was entitled to judgment against appellees, and each of them, in the sum of $14,986.17 with interest at six per cent per annum from October 4, 1957 until paid.

ARGUMENT POINT 6

Said Dickies, having consented to the commingling of the merchandise sold by them to the bankrupts, have the burden of pointing out the merchandise in the commingled mass which they sold.

In re Thompson, 164 Iowa 20, 145 N.W. 76 (1914).
Jones on Chattel Mortgages and Conditional Sales Contracts, Volume 1, Section 155 (Bowers Ed. 1933).
Jones on Chattel Mortgages, Section 483.
Thomas Roberts and Co. v. Robinson, 141 Md. 37, 118 A 198 (1922).

In discussing the foregoing points, the writer has assumed that all merchandise on hand at the time appellees acquired possession thereof, after the State Court proceeding, was "after-acquired" merchandise.

The bankrupts acquired the store and merchandise from appellees on or about April 11, 1955 and operated

same until on or about July 1, 1957 (Tr. 26, 28). During said period of time the bankrupts purchased and sold merchandise as follows:

	Purchases	*Sales*
(These figures do not include the purchase of the original inventory.)		
1955	$45,151.30	$56,366.85
1956	49,005.99	65,920.27
1957	10,970.95	14,289.76
Totals	$105,128.24	$136,576.88

The appellees were unable at the trial to testify as to the amount of merchandise, if any, on hand on July 1, 1957 which was the identical merchandise sold by them to bankrupts in April of 1955 (Tr. 89-90), although appellees went into possession on July 1, 1957 and continued in possession thereafter and, therefore, had the opportunity to examine and inventory the merchandise then on hand.

One of the bankrupts, Wanda Branch, testified that approximately one half of the original merchandise was still on hand on July 1, 1957 (Tr. 63) and the Court so found (Tr. 99).

But such testimony is, of course, at best, guesswork, and the law has placed the burden on one seeking to secure merchandise from a commingled mass to point out said merchandise if he allowed the commingling.

The Court in In re Thompson, 164 Iowa 20, 145 N.W. 76 (1914) stated:

> "In Jones on Chattel Mortgages, section 483, it is said: 'Where the confusion of the goods has taken place by the permissive act of the mortgagee, he is

not allowed to defeat the rights of the judgment creditor by claiming the goods under his mortgage. If, under such a mortgage, the mortgagee has permitted sale to be made by the mortgagor, and the latter afterwards makes an assignment for the benefit of creditors, and the assignee sells the goods, the mortgagee is entitled to only such part of the proceeds as come from (29) the sale of the goods embraced in the mortgage, and the burden is on him to show what goods, sold by the assignee, were subject to the mortgage lien. If he has allowed the goods mortgaged to be so intermingled with goods afterwards purchased as to prevent the ascertainment of those on hand when the mortgage was given, he must suffer the loss'—citing authorities. * * *

"Where, however, the intermixture is innocent, or by mistake, or even negligently done, where there is no willful fraud involved, the party causing the confusion would not lose his property, but he does not gain anything by it, and will be required, in order to protect himself, to point out and designate his property, or he loses the whole to the party with whose it is intermingled."

Also in Jones on Chattel Mortgages and Conditional Sales Contracts, Bowers Ed., Vol. 1, Sec. 155 (1933), the author states:

"When subsequently-acquired goods have been commingled with a mortgaged stock, the burden is upon the mortgagee, in a suit at law, to recover the mortgaged goods or their valuation to show that the goods he claims were on the premises or belonged to the mortgagor at the date of the mortgage. Citing Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825, and other cases."

The writer further states:

"Moreover, if the mortgage in terms covers goods afterwards to be acquired, the commingling of the

mortgaged property with that subsequently acquired is presumed to have occurred with the mortgagee's permission; and if they have been so intermixed as to prevent their separation or identification, the rights of third parties purchasing or levying upon the goods cannot be affected, citing Hamilton v. Rogers, 8 Md. 301."

In Thomas Roberts and Co. v. Robinson, 141 Md. 37, 118 A. 198 (1922), the facts were as follows:

Seller sold cans to Packer, who filled same with produce. Seller's agreement gave him the right to recover not only the cans but also the contents. Seller replevied and the trustee intervened.

The Court said at p. 202:

"With respect to the contents of the cans replevied in the present case, the plaintiff's claim is not of a title reserved under a conditional sale, but of a lien on material bought from other persons. To that extent the plaintiffs are in the same position in regard to the bankrupt estate as if they were claiming under an unrecorded chattel mortgage or bill of sale."

P. 203:

"There is nothing in the evidence to exclude the theory that the cans in which these potatoes were packed may have been some of those which appellees did not supply. As to that carload we think the proof of identification is not legally sufficient. * * *

"The fact that the cans obtained by Keel (the packer) from the various sources were mingled in the course of their use in his packing business might have prevented him from raising the question now under consideration; but it does not, as against the rights of third persons, entitle the appellees to the possession of property which is not proved to be within the terms and description of the contract by which their claim is sought to be supported."

The agreement (Ex. 2) specifically authorized the bankrupts to sell the merchandise in the ordinary course of trade and to acquire new and additional merchandise and did not forbid any commingling and, therefore, they are subject to the above rules; and since they were unable to point out their own merchandise, it must be assumed that all of the merchandise which came into the hands of the Trustee was after-acquired.

ARGUMENT POINT 7

Said Dickies failed to point out their merchandise and, therefore, lost whatever lien, if any, they held against the merchandise originally sold.

In accordance with the rules cited under Point 6 above, since the Dickies could not point out their merchandise, whatver lien, if any, they held against the merchandise originally sold is now lost.

ARGUMENT POINT 8

The Trustee is entitled to judgment against the Dickies for the full amount of the merchandise received by them from the bankrupts, namely the sum of $14,786.17, with interest at six per cent per annum from October 4, 1957, until paid.

Bankruptcy Act, Section 60, 11 U.S.C.A., Section 96 and Section 60a (6).

3 Collier on Bankruptcy, Section 60.09 at page 786, Section 60.39 at page 912 (Ed. 14th, 1956).

Matter of Greenberg, 48 F. Supp. 3 (D.C. Mass 1942).

Matter of Markert, 45 F. Supp. 661 (D.C. Mass. (1942).

The elements of a preference are as follows:

1. A transfer by debtor of his property.
2. To a creditor.
3. For an antecedent debt.
4. A transfer must be at a time when the debtor is insolvent.
5. The transfer must be within four months prior to the commencement of a bankruptcy proceeding.
6. The transfer must enable the creditor to obtain a greater percentage of his debt than some other creditor of the same class.
7. A creditor must have had reasonable cause to believe that the debtor, at the time of said transfer, was insolvent.

As applied to the facts in this case, the first three elements of a preference depend upon whether the acquisition of possession through the decree of the State Court proceeding by the appellees constituted at that time a transfer of property from the bankrupts to appellees. Section 60a of the Bankruptcy Act, subsection (2), provides that as to personal property, a transfer shall take place at the time when the alleged transferee so perfects his rights that a subsequent attaching creditor could not acquire superior rights. We have seen that in Oregon the taking of possession is equivalent to recording and after recording, or taking of possession, a subsequent attaching creditor could not acquire rights superior to the mortgagee, but that prior to said taking of possession an attaching creditor would prevail as against the mortgagee. Furthermore, Section 60a (6)

provides unequivocally that if a recording or delivery of possession is necessary in order that the mortgagee can prevail against attaching creditors, then the transfer shall be deemed to have taken place not earlier than the date of said recording or delivery of possession.

Therefore, in the instant case, since the appellees had prior to July 1, 1957 only an unrecorded chattel mortgage, perfection within the meaning of Section 60 of the Bankruptcy Act took place upon their receipt of possession of the property on said date. See Collier on Bankruptcy 14 Ed., Vol. 3, Sec. 60.09, p. 786, and Sec. 60.39, p. 912; Matter of Greenberg, 48 F. Supp. 3 (D.C. Mass. 1942); Matter of Markert, 45 F. Supp. 661 (D.C. Mass. 1942).

Therefore, the transfer took place on July 1, 1957, but the debt for which said transfer was made arose on April 11, 1955 in accordance with the contract of sale (Ex. 2). The transfer on July 1, 1957 was, therefore, upon an antecedent debt so that the first three elements of a preference are satisfied.

Elements four and seven are admitted facts in this proceeding (Tr. 6 and 71).

Since we have concluded that the transfer took place on July 1, 1957 and since the bankruptcy proceeding commenced on July 10, 1957 (Tr. 4), the transfer was within four months thereof.

It was stipulated in the proceeding that on July 1, 1957 there was owing by the bankrupts to appellees the sum of $16,697.17 and that the value of the fix-

tures was the sum of $2,000.00 and, therefore, the indebtedness unpaid after recovery by appellees of the fixtures was $14,697.17 (Tr. 70) and the inventory of merchandise received by them was in the sum of $14,786.17 (Tr. 6). Since the Trustee has on hand the sum of $1,374.44 to pay costs of administration and priority claims in the amount of $3,273.32 (Tr. 28-29), it is obvious that unless this transaction is set aside, appellees will receive a greater percentage of their debt than other creditors, since other general creditors will receive nothing.

CONCLUSION

Therefore, all of the elements of a preference are present and appellant is, therefore, entitled to judgment against the appellees for the sum of $14,786.17 with interest at six per cent per annum from October 4, 1957, the date of plaintiff's demand (Tr. 6), until paid.

Respectfully submitted,

Boyrie and Miller,
F. Brock Miller.